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October 23, 2020

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act

Dear Secretary Scalia:

As a Member of Congress, I write to urge the Department to withdraw its harmful proposed rule that would narrow the Department's interpretation of an employee's status under the Fair Labor Standards Act of 1938.

The Fair Labor Standards Act (FLSA) - which sets minimum wage, overtime, and child labor standards - has a broad employment standard that ensures its protections extend to a wide range of workers. Congress established a broad definition of "employ" to include "to suffer or permit to work."[1] In using this definition, Congress unmistakably rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over an employee.[2] In fact, employment under the FLSA's "suffer or permit to work" standard is the "broadest definition that has ever been included in any one act."[3] For decades, the courts have **effectuated** congressional intent to define employment status broadly by applying a multi-factor **economic realities test to help determine whether the worker is economically dependent on the potential employer or in business for him or herself.**[4] **While different courts use slightly different factors, the ultimate question is that of economic dependence.**[5]

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[1] 29 U.S.C. 203(g).
[2] "[T]he broad language of the FLSA, as interpreted by the Supreme Court . . . demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003).
[3] *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).
[4] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961).
[5] *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).

The Department's proposal to narrow its interpretation of employee status directly conflicts with the FLSA's text and congressional intent by creating a new test that centers around a control factor.[6] I am deeply concerned that this proposed rule will lead to increased misclassification of vulnerable workers, including those workers in the construction industry.

An estimated 1.6 million construction workers are employed throughout the country ensuring the lights turn on, our communities have clean water, and our roads and bridges are safe to drive on. These construction workers make sure our country can operate, often without receiving the recognition they rightfully deserve.

Worker misclassification has grown to become a serious problem in the construction industry that often goes unchecked and without punishment. Construction workers are highly susceptible to misclassification because employers have greater ability to conceal misclassification practices and employer responsibility is more difficult to determine. Work is often temporary, performed at isolated, small, or scattered sites, and with multiple layers of contractors and subcontractors.[7]

Construction contractors have a greater financial incentive to shift costs onto workers. Contractors who misclassify their workers are able to skim costs on healthcare, wages, worker safety, FICA taxes, worker unemployment, collective bargaining, and other worker benefits in order to gain an unfair bidding advantage over those employers who correctly play by the rules. A lack of enforcement only encourages more and more employers to cheat their workers and encourages a race to the bottom.

I am deeply concerned that the Department's flawed proposed rule would only exacerbate this problem of misclassification. Construction workers could be misclassified if, based on the Department's narrow control test, employers improperly change their classification from employee to independent contractor or hire them as independent contractors where they would otherwise be classified as employees. The Department's proposal fails to estimate the number of workers who could be misclassified as a result of its proposal or address the proposed rules impact on industries that experience rampant misclassification.

Construction workers misclassified under the Department's proposal would be at increased risk of wage theft where their employers improperly deny them the FLSA's minimum wage and overtime protections. This could lead to significant income losses for workers. For example, in 2016 the Wage and Hour Division (WHD) recovered roughly $21,000 in unpaid overtime for 19

[6] Two factors, the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss, are deemed core factors and given undue weight. According to the Department, where the two core factors point toward the same classification, the analysis is virtually complete and the other three factors should be approached with skepticism. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60612 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pt. 780, 788, 795).
[7] Françoise Carré, (In)dependent Contractor Misclassification. Economic Policy Institute 4 (2015), *http://www.epi.org/publication/independent-contractor-misclassification/*

workers who were misclassified by a construction company[8]—the equivalent of 2 months of earnings. The Department's proposed rule could serve as a "get out of jail free" card for this kind of wage theft.[9]

Congress's original intend for the FLSA was "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation."[10] Such a purpose cannot be met with the Department's narrow control test, which could leave out significant portions of the workforce.

Astoundingly, the Department fails to estimate how much workers would lose in wages under its proposal. The Economic Policy Institute estimates [*estimates are coming before the end of the comment period. If broken down by industry, include the topline (total) loss in wages and the loss of wages for particular relevant industry.*]

The Department also fails to acknowledge or quantify its proposed rule's potential impact on other key protections for workers that rely on the FLSA's definition of employment. This includes construction workers who are currently covered under equal pay protections under the *Equal Pay Act of 1963* and the paid leave provisions that were included in the *Families First Coronavirus Response Act (FFCRA)*. These protections are critical for construction workers because they ensure that these hard-working men and women will be able to receive equal and fair pay for a hard day's work. The provisions in *FFCRA* are critical to those workers in the construction industry because they cannot work remotely and need to have paid family and sick leave in order to take care of their family and loved ones.

While this proposal would impact the Department's interpretation of employee status under the FLSA, the Department assumes that employers will use the same classification for a particular worker across benefits and requirements. This could leave workers with fewer employer-provided benefits, such as health insurance and retirement contributions. The Department also fails to quantify these losses of benefits. The Department also fails to address how the misclassification of workers under its proposed rule might impact labor insurance programs, such as unemployment insurance, workers' compensation, and disability insurance systems, that are critical for construction workers. For example, a 2000 DOL-commissioned study found nearly $200 million in lost unemployment insurance tax revenue per year through the 1990s due to misclassification. During that time period, annually, an estimated 80,000 workers entitled to UI benefits were not receiving them.[11] Notably, as a result of worker misclassification, low wages, and overly stringent state rules, just one in four unemployed workers received

[8] https://www.dol.gov/newsroom/releases/whd/whd20161128
[9] The Department notes agency interpretations provide employers with a defense against minimum wage and overtime protections. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60610; 29 U.S.C. 259.
[10] *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510-11.
[11] Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration 69 (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

Unemployment Insurance benefits in recent years—a historic low in the program's 85-year history.[12] The Department fails to quantify or include any analysis on these potential impacts.

According to reporting from Bloomberg, the Department is attempting to complete this rule before the end of the year.[13] I am appalled that the Department is attempting to push through a rule that would leave workers, including construction workers, worse off while providing an inadequate opportunity for the public to weigh in and failing to include required information on how the proposed rule would negatively impact workers. [14]

Right now, more than ever, workers need the wage and hour protections that are critical to supporting the economic security of our communities. Any efforts to fast track a rule that would exclude workers from minimum wage and overtime protections, especially during a period of deep economic strife for millions of workers, are a strong indicator of the agency's priorities.

I strongly urge the Department to withdraw its harmful proposed rule.

Sincerely,

Donald Norcross
Member of Congress

[12] https://www.americanprogress.org/issues/poverty/reports/2016/06/16/138492/strengthening-unemployment-protections-in-america/
[13] Ben Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish*, (July 2, 2020), https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish
[14] The Department has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period. Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days." Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).